BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHELLY MARIE CHIASSON (GALLMEISTER)	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,767
CHRISTOPHER MANOR	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the April 20, 2000, Award of Administrative Law Judge Jon L. Frobish. Claimant was granted a 5 percent whole body functional impairment but denied a work disability for the injury suffered on January 31, 1997. The Board held oral argument on September 20, 2000.

APPEARANCES

Claimant appeared by her attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations of the Administrative Law Judge as contained in the Award.

ISSUES

Claimant contends she is entitled to a work disability from a low back injury suffered on or about January 31, 1997. The Administrative Law Judge granted claimant a 5 percent

whole person functional impairment to her low back but denied her a work disability, finding that claimant retained the ability to earn a comparable wage but had voluntarily terminated her employment from a comparable wage, post-injury job for personal reasons. Claimant also contends the 5 percent whole person functional impairment should have been substantially higher, arguing entitlement to a 20 percent functional impairment pursuant to the opinion of Pedro A. Murati, M.D. The only issues before the Board deal with the nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed. Claimant is granted a 5 percent whole person functional disability but denied a work disability.

Claimant began working for Christopher Manor in El Dorado, Kansas, in September 1996. On January 31, 1997, while lifting a patient, claimant felt a pop in her low back. She stated that the incident either did not cause her pain at that time or she only experienced a tingling. However, as she continued working through the day, her back became painful. It continued to bother her that night at home.

The next day, claimant contacted respondent, advising that she had suffered some kind of back injury and would not be able to work the remainder of the weekend. She then went to her personal chiropractor Glen A. Heese, D.C., in Emporia, Kansas. Claimant was placed on light duty. She provided respondent with the light duty slip and worked February 4 and 5, 1997.

Claimant was then referred to a series of medical doctors including Dr. Carol Coirier, her family physician; Amy D. Seeber, M.D.; H. Richard Kuhns, M.D.; Paul Stein, M.D., a neurosurgeon; and ultimately came under the care of Frederick Ray Smith, D.O., in Wichita, Kansas. Claimant underwent several weeks of physical therapy and was provided certain work restrictions from Dr. Smith which limited her lifting to no more than 20 pounds, pulling no more than 25 pounds, pushing no more than 25 pounds, and carrying no more than 20 pounds. Dr. Smith also restricted claimant from repetitive lifting or stooping more than ten times per hour. He felt these restrictions would prevent claimant from reinjuring herself.

Claimant underwent a CT scan in May of 1997, which was read as normal. Although there was a slight bulge at L5-S1, Dr. Smith did not believe it to be significant. She also underwent an MRI in July of 1998 which indicated an "axial image" at L5-S1 which Dr. Smith and the radiologist described as being normal.

Dr. Smith initially assessed claimant no functional impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, using the DRE model of the Guides. He acknowledged on cross-examination that claimant could qualify under the AMA Guides DRE II for a 5 percent whole person impairment. However, he did not think her symptoms would justify that rating.

Claimant was examined by Pedro A. Murati, M.D., at the request of her attorney on November 30, 1998. Dr. Murati acknowledged that the x-rays and MRIs taken of claimant's thoracic and lumbar spine were read as negative. However, Dr. Murati felt claimant should still be restricted after he diagnosed a lumbosacral strain with right SI joint dysfunction and probable right L5 radiculopathy. He restricted claimant from frequent standing, sitting and walking, recommending that she alternate those positions. Dr. Murati would allow claimant to occasionally bend, climb stairs, climb ladders, squat, drive and kneel, but prohibited claimant from crawling and recommended she use good body mechanics at all times.

Dr. Murati placed weight restrictions on claimant, limiting her ability to lift, carry, push and pull to 20 pounds occasional, 10 pounds frequent and 5 pounds constant. Based upon the AMA Guides, Fourth Edition, he found claimant to have a 13 percent impairment to the body as a whole resulting from her limited range of motion. Dr. Murati also testified that, according to the AMA Guides, Fourth Edition, claimant qualified under DRE category III for a 10 percent whole person impairment. At his deposition, he modified his ratings to show claimant at 20 percent to the body as a whole under DRE category IV rather than category III, and felt this increase was justified based upon his miscalculation of the claimant's loss of strength in her right big toe at the time of his examination.

At the time claimant was examined by Dr. Murati, she was working for a comparable wage at Coastal Mart. Claimant advised him she was very satisfied with her job and was doing well. Dr. Murati was asked to consider a list of twenty-four tasks which claimant had performed in the fifteen years preceding her injury. Dr. Murati felt claimant was incapable of performing eleven of the twenty-four, for a 45.7 percent task loss. Dr. Smith provided no opinion regarding claimant's loss of task performing abilities.

Claimant saw Dr. Coirier on February 6, 1997. The medical restrictions of Dr. Coirier indicated claimant should be off work for one week. February 5, 1997, was the last day claimant worked for respondent. Claimant did go in to respondent on either February 19 or February 20 to fill out certain workers compensation forms.

On February 21, 1997, Dr. Seeber placed claimant on light duty. Claimant went to the respondent's office and talked to Peggy, the payroll person, and informed her of the doctor's restrictions. Claimant testified that she was told by Peggy (respondent's representative denied anyone named Peggy worked for respondent in their payroll department) that claimant could probably work light duty and that claimant was to contact

either Peggy or Judy in the future about her workers compensation injury. After claimant filled out the incident report on either February 19 or February 20, claimant never again contacted respondent about the possibility of returning to work. Claimant did attempt to return to work for Chase County Rehabilitation Center in Cottonwood Falls, Kansas, another facility owned by respondent's owners. However, claimant at no time after February 5, 1997, attempted to return to work for respondent at its El Dorado facility.

In October 1997, claimant began working for McDonald's in El Dorado. She was making $5.45 per hour but only working 32 hours a week. Claimant later transferred to a truck stop in Strong City, Kansas, where she worked as a cook, earning $5.75 an hour. Claimant again was only working 32 hours a week. The record does not detail how long claimant worked for these two establishments.

On August 31, 1998, claimant was hired to work at Coastal Mart at $6.25 per hour, working full time. Based upon claimant's average weekly wage of $239.39 per week as contained in the stipulations of the parties, the job at Coastal Mart paid claimant a wage greater than 90 percent of claimant's average weekly wage at the time of her injury.

Claimant continued working for Coastal Mart until January 1999. However, for a brief period of time, in approximately October 1998, claimant was off work because of a knee injury suffered while working at Coastal Mart.

While claimant was working at Coastal Mart, claimant's son, a special education student, encountered problems at his school. Claimant was advised that she would have to relocate her son to a different school. As a result, claimant left her job at Coastal Mart and relocated with her son to Missouri. Claimant had relatives in Missouri and felt that it would be good for her son to go to school with his cousins. At the time of the relocation to Missouri, claimant's son was in such trouble with the school district that Chase County refused to allow him to attend school.

Claimant worked several jobs after leaving respondent. While claimant worked only part time on several of those jobs, there is no medical restriction in the record which prevents claimant from working full time.

At the time of the regular hearing on January 6, 2000, claimant was working at Hardee's on the turnpike as a cook. Claimant was earning $5.50 an hour and working from 30 to 32 hours a week. Claimant was the sole support for herself and her son, as her husband was on Social Security disability and unable to work.

Claimant's complete work history after her injury with respondent is not in the record. With the exception of the work history given above, no information was provided as to how long claimant was employed with any employer. It is clear, however, that, for each job

claimant worked after leaving respondent, if she had worked full time, her hourly wages would have allowed her to earn a weekly wage which would have been 90 percent or greater than the average weekly wage she was earning from respondent at the time of her injury.

K.S.A. 1996 Supp. 44-510e states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Administrative Law Judge limited claimant's award to a functional impairment, finding that claimant was earning a comparable wage prior to relocating to Missouri. The Appeals Board finds claimant would be limited under K.S.A. 1996 Supp. 44-510e during the times when she was employed with the various businesses after leaving respondent as in each instance claimant was capable of earning a wage 90 percent or greater than that she was earning on the date of her accident. Therefore, claimant is limited to her functional impairment.

Additionally, while claimant was working for Coastal Mart, it was acknowledged she was earning a wage that was equal to or greater than the wage she was earning on the date of her accidental injury. Therefore, during that period of time, claimant would also be limited to her functional impairment pursuant to K.S.A. 1996 Supp. 44-510e.

As noted by the Administrative Law Judge, claimant's decision to terminate her employment at Coastal Mart was made for personal reasons. Claimant argues, in her brief, that the job at Coastal Mart exceeded her restrictions. This is contradicted in the record. First, claimant advised Dr. Murati that she was satisfied with her job at Coastal Mart and she was enjoying what she was doing. Additionally, claimant testified that, when she first started working at Coastal Mart, she was under no restrictions. She was then provided medical restrictions while working at Coastal Mart. She then took those restrictions to her boss, Mark McKay. While he was not happy about the restrictions, he did say that they would have to make different arrangements. From that point forward, claimant received assistance in performing the duties which exceeded her restrictions. Therefore, it appears from claimant's own testimony that Coastal Mart did accommodate the restrictions placed upon her while employed there.

The Board acknowledges that neither K.S.A. 44-510e nor the policies contained in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), requires a claimant to seek post-injury accommodated work from his or her

employer in every circumstance. What Foulk and its progeny are concerned with is a claimant who is able to work but refuses to do so. Good faith requires that a claimant seek full-time work when able to do so. This record is not determinative on whether claimant looked for full-time work. However, there is no evidence in the record limiting claimant to part-time employment, and it is claimant's burden to prove she put forth a good faith effort to find appropriate employment.

Finally, claimant acknowledged that she was being provided light duty immediately after the original January 31, 1997, injury. The Appeals Board finds it evidence of a lack of good faith that claimant failed to return to respondent after February 5, 1997, to request light duty, even though claimant was later provided light duty restrictions by several doctors. *See* Oliver v. Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ___ Kan. ___ (1999).

There is also no indication in the record that respondent offered claimant full-time accommodated employment within her permanent restrictions. However, claimant was offered and actually worked light duty on February 4, 1997, and February 5, 1997, after providing a light-duty slip to respondent. While the Act does not impose an affirmative duty upon the employer to offer full-time accommodated work to claimant[1], it also does not establish an affirmative duty upon the employee to request accommodated work. "Whether a claimant requested accommodated work from an employer is just one factor, viewed along with rest of the record, in determining whether the claimant in good faith attempted to obtain appropriate work." Oliver, *supra*. In Oliver, it was found significant that respondent was aware of claimant's deteriorating condition for some time. When claimant requested work restrictions or a transfer to a lighter job, his request was refused. Claimant was even forced to work overtime on a weekly basis, even after advising respondent he was unable to do so. The claimant in Oliver was found to be physically unable to perform the job on the day he resigned. Here, however, claimant was working for Coastal Mart without restrictions for a period of time. Then, when her doctor did provide restrictions, they were accommodated. There is nothing in the record to indicate claimant ever provided those restrictions to respondent. It was after this that claimant voluntarily terminated her employment and moved to Missouri.

For the reasons above stated, the Appeals Board finds claimant should be limited to her functional impairment.

Dr. Murati originally assessed claimant a 10 percent impairment under DRE lumbosacral category III. During his deposition, Dr. Murati modified that to give claimant a 20 percent impairment under DRE IV rather than DRE III, as he assessed claimant a

---

[1] *See* Griffin v. Dodge City Cooperative Exchange, 23 Kan. App. 2d 139, 927 P.2d 958 (1996), *rev. denied* 261 Kan. 1082 (1997).

9 percent rating for loss of muscle strength, even though he did not have the opportunity to re-examine claimant. It is significant that, in Dr. Murati's original diagnosis, loss of muscle strength is not mentioned. Claimant was diagnosed only with loss of range of motion of the lumbosacral spine, right SI joint dysfunction and probable right L5 radiculopathy.

The Administrative Law Judge found that Dr. Smith had assessed claimant no functional impairment. However, this is not entirely accurate. While Dr. Smith did originally testify that claimant was entitled to no functional impairment under the AMA Guides, Fourth Edition, he did ultimately testify that, under the DRE II, claimant could very legitimately qualify for a 5 percent permanent partial impairment of the body as a whole. His reason for initially denying claimant a functional impairment was due to the normalcy of the CT scan and MRIs and further due to the fact that he did not believe the radicular complaints expressed by claimant were justified or supported by his examination. The Appeals Board finds based upon the symptoms displayed by claimant and under the AMA Guides, Fourth Edition, and taking into consideration the opinions of both Dr. Smith and Dr. Murati, an impairment under the DRE II would be appropriate and awards claimant a 5 percent whole body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated April 20, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's findings of fact and conclusions of law.

First, I believe claimant made a good faith effort to find appropriate employment after recovering from her back injury. The jobs that claimant obtained before commencing work for Coastal Mart paid less than 90 percent of her pre-injury wage. Therefore, claimant is entitled to receive a work disability (a permanent partial disability greater than the functional impairment rating) for that period.

Second, claimant has not attempted to manipulate her workers compensation claim and, therefore, should receive a work disability for the period commencing with her return to Kansas and her job search. Claimant left, for personal reasons, Coastal Mart and a job that paid a wage comparable to her pre-injury wage. But, under these circumstances, once claimant returned to Kansas and began looking for work, a post-injury wage should no longer be imputed and claimant should be entitled to receive benefits for a work disability.

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Stephen P. Doherty, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director